

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION) CASE NO. 41G-114
OF THE EXISTING RIGHTS TO THE USE) 41G-W-124943-00
OF ALL THE WATER, BOTH SURFACE AND) 41G-W-124945-00
UNDERGROUND, WITHIN THE JEFFERSON) 41G-W-124946-00
RIVER DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE JEFFERSON RIVER)
IN BROADWATER, GALLATIN, MADISON,)
JEFFERSON AND SILVER BOW COUNTIES,)
MONTANA.)

FILED

SEP 27 1993

CLAIMANT: Tobacco Root Gold Corp.

Montana Water Court

OBJECTOR: Montana Department of Fish, Wildlife and Parks

ORDER COMPELLING DISCOVERY AND
DENYING MOTION FOR FIELD INVESTIGATION

On September 1, 1993, the objector Montana Department of Fish Wildlife and Parks (DFWP) filed Motions to Compel Discovery, For Sanctions and Field Investigation and supporting brief in this case as well as cases 41G-115, 41G-116, 41G-118, 41G-119 and 41G-120. With these Motions DFWP filed copies of its First Requests for Admissions, First Requests for Production of Documents and Second Interrogatories from the Department of Fish Wildlife and Parks (hereinafter "Discovery Requests.") The Discovery Requests were served upon the claimant on May 19, 1993. Exhibits 1 through 7 of DFWP's motion indicate that DFWP contacted the claimants on several occasions requesting that the claimants respond to the Discovery Requests and also to arrange site inspections of the various water right claims. Exhibit 2, the Affidavit of G. Steven Brown, attorney for DFWP, indicates that a site inspection

mutually arranged by the parties for August 17, 1993 did not take place because the claimants' representative, Vern Hughes, failed to meet the objector at the time and place agreed upon. As of this date, the claimants have not responded to the Discovery Requests.

In its Motion DFWP requests that the Water Court enter an Order directing the claimants as follows:

1. Compelling Vern Hughes and/or Tobacco Root Gold Corporation to answer DFWP's Discovery Requests.

2. Directing Vern Hughes and/or Tobacco Root Gold Corporation to pay DFWP's attorney fees and costs incurred in preparing the Motion and Brief and the original Discovery Requests.

3. Directing Vern Hughes and/or Tobacco Root Gold Corporation to pay DFWP's attorney fees, mining consultant fees and costs incurred for the scheduled tour of each claimant's mining water right claims on August 17, 1993.

4. Directing the Department of Natural Resources and Conservation (DNRC) to conduct a field investigation of the water right claims filed by Vern Hughes and/or Tobacco Root Gold Corporation in this case and in cases 41G-115, 41G-116, 41G-118, 41G-119 and 41G-120.

5. Awarding DFWP any further relief deemed appropriate under the facts of this case.

With respect to items no. 3 and 4 requested by DFWP, the Court notes that none of the issues in the above cases have been raised by Motion of the Water Court as a result of Department of Natural Resource and Conservation verification of these claims.

The issues have been raised solely by the objections of other parties. All the normal avenues of discovery under Rule 26, M.R.Civ.P.--and in particular Rule 34, M.R.Civ.P. regarding entry upon land for inspection--are available to the objector in these cases. The record does not indicate that the site inspection scheduled by the parties for August 17, 1993 was requested pursuant to Rule 34, rather it appears to have been arranged by mutual agreement. Nor does it appear that the objector has made a Rule 34 request upon the claimant.

For purposes of adjudicating water rights, a claim of existing right filed in accordance with the statute or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. Section 85-2-227, MCA. Absent specific issues requiring clarification that have been raised by the DNRC's examination of claims, this Court is obligated to respect the prima facie status of claims and is not inclined to direct a field investigation. The Court has already denied a similar motion in these cases on November 24, 1992. The burden of discovering information to prosecute its objection is on DFWP. Furthermore, absent a Rule 34 Request for Entry Upon Land, the Court cannot sanction a party for failing to appear at an inspection arranged by informal mutual agreement.

With respect to items no. 1 and 2 requested by DFWP, Rule 37, M.R.Civ.P. allows application by a party for an Order Compelling Discovery when the opposing party fails to respond to reasonable discovery requests. Subdivision (a)(4) of the Rule

provides that "the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Rule 37(a) (4) does not require a hearing but merely an opportunity for a hearing on expenses. It is the burden of the party opposing the award to request a hearing on whether such an award is warranted under the circumstances. State ex rel. Burlington Northern R.R. Co. v. District Court, 239 Mont. 207, 222, 779 P.2d 885 (1989).

Objector DFWP certified that the Motion was served on all parties in the case. Over 10 days, plus an additional 3 days for service by mail, have elapsed since the September 1, 1993 filing of the Motion. Rule 6, M.R.Civ.P. No response to the Motion has been filed. Thus, the record does not indicate any justified opposition to the Motion. Furthermore, because no response has been filed, there is nothing in the record at this time demonstrating any circumstances that may make an award of expenses unjust. See e.g., Granite County v. Komberec, 245 Mont. 252, 800 P.2d 166 (1990).

Failure to file an answer brief by the adverse party within ten days shall be deemed an admission that the Motion is well taken. Rule 2, Montana Uniform District Court Rules. Therefore, pursuant to Rule 37, M.R.Civ.P. and Montana Uniform

District Court Rule 2, DFWP's Motion to Compel Discovery, For Sanctions and Field Investigation is deemed well taken in-part, and it is hereby

ORDERED that the claimant shall respond to DFWP's Discovery Requests by November 15, 1993,

FURTHER ORDERED that the claimant shall pay DFWP's reasonable expenses incurred in obtaining this Order, including attorney's fees, and

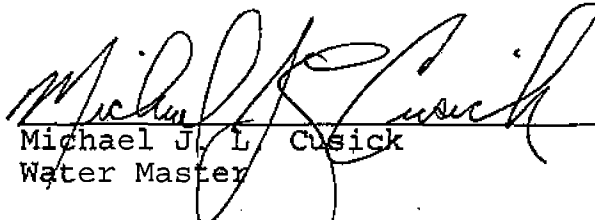
FURTHER ORDERED that DFWP shall submit its Affidavit of reasonable expenses incurred in obtaining this Order and serve a copy upon the claimant by November 15, 1993. Claimant shall have until December 6, 1993 to file a response opposing the amount claimed as expenses incurred by DFWP in obtaining this Order.

For the reasons discussed above, it is

FURTHER ORDERED that DFWP's Motion for field investigation is DENIED, and

FURTHER ORDERED that DFWP's Motion for an order directing the claimant to pay attorney and consultant fees and costs incurred for the failed site inspection scheduled for August 17, 1993 is DENIED.

DATED this 27th day of September 1993.


Michael J. L. Cusick
Water Master

G. Steven Brown, Attorney
1313 Eleventh Ave.
Helena, MT 59601

Tobacco Root Gold Corp.
Drawer J
Twin Bridges, MT 59754